

file

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application of Walter G. E. Heiden for a Permit)	
to Construct a Structure on the Bed of the)	3-SE-95-296
Milwaukee River, Village of Thiensville,)	
Ozaukee County, Wisconsin)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Walter G. E. Heiden applied to the Department of Natural Resources for a permit to construct a retaining wall on the bed of the Milwaukee River. On June 5, 1995, the Department of Natural Resources issued a preliminary decision denying the issuance of the permit to construct the retaining wall. Mr. Heiden requested a contested case hearing. By letter dated June 20, 1995, the Department granted the request for a contested case hearing. On January 12, 1996, the Department filed a request for hearing with the Division of Hearings and Appeals.

Pursuant to due notice, a hearing was conducted in Thiensville, Wisconsin on February 26, 1996, before Mark J. Kaiser, Administrative Law Judge.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Walter G. E. Heiden, Applicant
705 Riverview Drive
Thiensville, Wisconsin 53092-1735

Wisconsin Department of Natural Resources, by

Robin Nyffeler, Attorney
P. O. Box 7921
Madison, Wisconsin 53707-7921

FINDINGS OF FACT

1. Walter G. E. Heiden, 705 Riverview Drive, Thiensville, Wisconsin, owns property along the Milwaukee River. The legal description of the project site is the SE 1/4 of the NW 1/4 of Section 23, Township 9 North, Range 21 East, Ozaukee County. The Heiden property is located on an impoundment behind the Thiensville Dam. The Milwaukee River is navigable at the project site.

2. Mr. Heiden filed an application pursuant to sec. 30.12(3), Stats., with the Department of Natural Resources (Department) on April 27, 1995, for a permit to construct a seawall on the bed of the Milwaukee River. He is seeking a permit to install a lannon stone wall approximately thirty inches high and one hundred feet long along bank of the Milwaukee River. The proposed seawall would be constructed below the ordinary high water mark of the Milwaukee River. The purpose of the seawall is to prevent continued erosion of the shoreline in front of the Heiden property. The Department and Mr. Heiden have fulfilled all procedural requirements of sec. 30.02, Stats.

3. The proposed project is detrimental to the public interest as it relates to the aesthetics of the natural shoreline of the Milwaukee River. A vertical seawall is not consistent with the appearance of the natural shoreline of the Milwaukee River. Construction of a lannon stone seawall will have an adverse impact on the public interest in the aesthetics of the natural shoreline of the Milwaukee River.

4. Construction of the proposed seawall would be detrimental to the public interest in preserving aquatic habitat. The shallow water zone, where the water meets the bank, is an important area in the food chain. The vegetation in this area provides a food source and substrate for invertebrates, which provide food for fish and other aquatic life. Vegetation and natural materials in this zone also provide spawning areas and cover for juvenile fish.

5. Seawalls are barriers to survival of animals, such as amphibians, that require access to both aquatic and terrestrial environments. Mr. Heiden argues that the proposed seawall will have no impact on these animals because the animals will simply move around the seawall. Although it is difficult to quantify the detrimental effects to the public interest in preserving habitat for these animals resulting from the construction of one more seawall, it is this type of incrementalism that the Wisconsin Supreme Court addressed in Hixon v. PSC, 32 Wis. 2d 608, 146 N.W. 2d 577 (1966).

In Hixon, the court required the Department to consider cumulative impacts of intrusions into navigable waters. Although it is impossible to conclusively find that this proposed project will adversely impact any specific animal, seawalls do impede the ability of animals to move between the water and land. An additional seawall will have an incremental impact on these animals.

6. A reasonable alternative to constructing a vertical seawall exists which will achieve the goal, erosion control, sought by Mr. Heiden without having a detrimental impact on the public interest in navigable waters. In addition to erosion control, Mr. Heiden argues that the seawall is necessary to provide safe access to the water for his wife and grandchildren. The Department indicated it is not opposed to modifications to the standard rock rip-rap revetment which would include a pier or stairway for safe access.

7. The proposed project will not constitute a material impairment to navigation.

8. The proposed project will not increase water pollution in Milwaukee River and will not cause environmental pollution as defined in subsection 144.01(3), Stats.

CONCLUSIONS OF LAW

1. The applicant is a riparian owner within the meaning of sec. 30.12, Stats.

2. The proposed project is detrimental to the public interest in navigable waters and does not meet the requirements for a permit set forth at sec. 30.12, Stats.

3. Pursuant to sec. NR 150.03(8)(f)4, Wis. Adm. Code, the proposed project is a type IV action. Type IV actions do not require the preparation of a formal environmental impact assessment.

4. Pursuant to secs. 30.02 and 227.43(1)(b), Stats., the Division of Hearings and Appeals has the authority to issue the following order.

ORDER

The order of the Department dated June 5, 1995, denying the application of Walter G. E. Heiden for a permit to construct a lannon stone seawall on the bed of the Milwaukee River is affirmed.

Dated at Madison, Wisconsin on March 27, 1996.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 267-2744

By



MARK J. KAISER

ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.